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13  
14 IN THE UNITED STATES DISTRICT COURT  
15 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
16 SAN FRANCISCO DIVISION

17 **PEOPLE OF THE STATE OF CALIFORNIA**  
*ex rel.* **EDMUND G. BROWN JR.,**  
18 **ATTORNEY GENERAL OF THE STATE OF**  
**CALIFORNIA,**

19 Plaintiff,

20 v.

21 **UNITED STATES ENVIRONMENTAL**  
22 **PROTECTION AGENCY,**

23 Defendant.

Case No.: C 08-00735 SC

JOINT CASE MANAGEMENT  
STATEMENT AND [PROPOSED]  
ORDER

Date: August 1, 2008  
Time: 10:00 a.m.  
Place: Courtroom 1, 17th Floor  
Judge: Hon. Samuel Conti

24  
25  
26 The parties to the above-entitled action jointly submit this Case Management Statement.

27 1. Jurisdiction and service: The parties agree that this Court has personal jurisdiction over  
28 defendant United States Environmental Protection Agency (“EPA”). EPA has been served and

1 has appeared.

2 2. Facts:

3 The People's Contentions

4 The People contend that in December 2005, the California Air Resources Board ("CARB")  
5 requested from EPA a waiver of preemption under section 209(b) of the Clean Air Act, 42  
6 U.S.C. § 7543(b), for CARB's regulations to control greenhouse gas emissions from new motor  
7 vehicles ("GHG Regulations"), adopted in 2005 to implement the Pavley law (Assembly Bill  
8 1493). The Clean Air Act gives California express authority to set its own emission standards  
9 provided it receives a waiver of preemption from EPA. The GHG Regulations are the most  
10 significant regulations currently in existence anywhere in the nation to address global warming,  
11 and at least twelve states would have been free to implement the same regulations if California  
12 had received the EPA waiver.

13 Despite demonstration of the severe effects of global warming on California's population,  
14 economy, and environment, EPA failed to take action on the waiver request for two years. On  
15 December 19, 2007, EPA Administrator Stephen Johnson rejected California's request to  
16 implement regulations on emissions of greenhouses gases. The decision represents the first time  
17 EPA has denied a request by California to impose its own pollution rules: it previously has  
18 granted the state approximately 50 waivers.

19 On December 27, 2007, plaintiff People of the State of California (the "People") sent a  
20 request to EPA under the Freedom of Information Act, 5 U.S.C. § 552, *as amended* ("FOIA"),  
21 seeking the disclosure of records related to the waiver denial, "including communications within  
22 and outside the federal government related to the waiver request, drafts of the decision document,  
23 analyses comparing emission reductions, fuel savings, or fuel economy increases that could result  
24 from implementation of the GHG Regulations to those that could result from implementation of  
25 federal legislation, and briefing materials related to the waiver request that were prepared for the  
26 Administrator or senior staff of EPA, including, but not limited to, the PowerPoint presentation  
27 referenced in the December 20, 2007 Washington Post article entitled 'EPA Chief Denies Calif.  
28 Limit on Auto Emissions.'" Complaint filed January 31, 2008 ("Complaint"), ¶ 7 and Ex. B; *see*

1 Answer filed March 3, 2008 (“Answer”), ¶ 7. The People seek these records to inform the public  
2 about the process by which the determination was made, and to aid the State of California in its  
3 petition challenging the denial of the waiver request, *State of California v. United States*  
4 *Environmental Protection Agency*, No. 08-70011 (9th Cir. Jan. 2, 2008).

5 The People contend that EPA failed to produce any responsive records, or to respond to the  
6 FOIA request at all, prior to the filing of the Complaint on January 31, 2008. Complaint, ¶ 9;  
7 Answer, ¶ 9. The People also contend that, despite having produced over 27,000 pages of  
8 documents to Congress, all of which are likely responsive to the People’s FOIA request, to date  
9 EPA has failed to provide the People with all the non-exempt documents and portions of  
10 documents called for by their request. They also contend that, five months after the filing of the  
11 complaint, EPA still has not produced an index to the withheld documents (and portions of  
12 documents) that comports with Ninth Circuit precedent, and that EPA should be ordered to do so  
13 immediately.

#### 14 EPA’s Contentions

15 EPA contends that it has produced documents in full to the plaintiff on April 3, 2008  
16 (approximately 2,700 pages), on April 7 (approximately 2,300 pages), and on April 11, 2008  
17 (approximately 4,000 pages). In addition, on May 22, EPA produced an additional 5,378 pages  
18 of documents released in full or in part. EPA further contends that plaintiff’s FOIA request at  
19 issue here is different from and narrower than the records that were requested by Congress in  
20 December 2007 and produced through July 2008.

21 Additionally, for approximately 250 records, the EPA has consulted with other federal  
22 agencies and White House entities and officials. EPA has completed that process for records  
23 from other agencies and has released additional records on June 24, 2008 and July 2, 2008. EPA  
24 is still consulting with the White House entities and officials concerning the remaining records.

25 On May 30, 2008, EPA provided the plaintiff with a 349 page list that provided *each*  
26 *document* that EPA has withheld, in full or in part, responsive to plaintiff’s FOIA request with  
27 the exception of approximately 250 records for which the Agency was consulting with other  
28 agencies and offices about the processing. Additionally, although Defendant has made no

1 agreement to produce a Vaughn index prior to the filing of its dispositive motion, on July 3,  
2 2008, EPA provided plaintiffs with a sample 237 page Vaughn index for 202 documents  
3 withheld in full or in part (approximately every 10<sup>th</sup> document).

4 Additionally, EPA notified the Plaintiff by letter dated July 2, 2008 that EPA was  
5 processing records in another FOIA case whose request was broader than the plaintiff's. EPA  
6 advised that it was processing 1800 records and would finish by August 4, 2008. EPA explained  
7 that during the processing in that case, it located a small subset of records that are responsive to  
8 the request at issue here and offered to produce them upon request.

9 Defendant EPA contends that the reason for plaintiff's FOIA request is irrelevant.

10 3. Legal issues:

11 The Freedom of Information Act requires that government agencies shall, on receipt of a  
12 proper request, promptly disclose their records unless those records are subject to withholding  
13 pursuant to one of FOIA's exemptions. The People assert the following:

- 14 (a) Pursuant to 5 U.S.C. § 552(a)(3), the People have a right of access to the  
15 requested records and portions of records EPA has withheld, as they are not  
16 exempt from disclosure under FOIA and thus have been improperly withheld;
- 17 (b) Pursuant to 5 U.S.C. § 552(b), even if it were to be established that any of the  
18 requested records contained information exempt from disclosure under 5 U.S.C. §  
19 552(b), the People have a right of access to all reasonably segregable non-exempt  
20 portions of such records, and FOIA requires their disclosure;
- 21 (c) Documents EPA produced to Congress, pursuant to subpoena or otherwise, have  
22 lost any exemption under FOIA they would otherwise have had;
- 23 (d) Under applicable Ninth Circuit precedent, EPA must produce a *Vaughn* index  
24 one that lists *every single document withheld*, not merely a sample without  
25 further delay;
- 26 (e) Even if the records sought were otherwise exempt from required disclosure under  
27 5 U.S.C. § 552(b), there is a strong public interest in their disclosure, and EPA  
28

1 should exercise its discretion to disclose the requested records; and

- 2 (f) The People are entitled to costs and attorneys' fees pursuant to 5 U.S.C. §  
3 552(a)(4)(E).

4 EPA asserts that, to date, plaintiff has been provided with all of the responsive,  
5 unredacted, non-exempt documents (or portions thereof) to which it is entitled under FOIA  
6 notwithstanding the approximately 150 documents that require additional consultation with White  
7 House entities and officials, which is currently underway, to determine the applicability of any  
8 FOIA exemptions; EPA anticipates that such consultation will be completed in the near future and  
9 any responsive documents will be provided to plaintiff on or around August 15, 2008 and that the  
10 documents (or portions thereof) that were not provided to plaintiff were properly withheld  
11 pursuant to the exemptions set forth in FOIA, including but not limited to Exemption 5 (the inter-  
12 agency and intra-agency documents exemption, the attorney-client and/or attorney work product  
13 exemption) and Exemption 6 (the privacy exemption). Defendant EPA asserts that there is no  
14 waiver of such exemptions in the instant matter. Finally, defendant asserts that a sample Vaughn  
15 index is proper and appropriate under Ninth Circuit law.

16 The following legal issues are disputed:

- 17 (a) Whether EPA must produce a *Vaughn* index that lists all the documents  
18 and portions of documents withheld, and the justifications for their  
19 withholding;
- 20 (b) Whether any documents or portions thereof that EPA did not produce to the  
21 People were exempt from disclosure under FOIA and therefore properly  
22 withheld;
- 23 (c) Whether production of documents to Congress waives any applicable FOIA  
24 exemption;
- 25 (d) The appropriate timing of EPA's production of a *Vaughn* index; and
- 26 (e) Whether the People are entitled to costs and attorneys' fees under 5 U.S.C.  
27 § 552(a)(4)(E).  
28

1           4.     Motions/Narrowing of Issues: The People filed and submitted a Motion for  
2 *Vaughn* Index on March 21, 2008. It was set for hearing on April 25, 2008, but the Court took it  
3 off calendar, and a decision is still pending. The People contend that it is not moot, because the  
4 “sample” *Vaughn* index EPA has produced does not comply with Ninth Circuit precedent, and a  
5 ruling on the still-pending motion for a *Vaughn* index could obviate the need for the People to file  
6 a motion seeking amplification or supplementation of the index. EPA contends that the sample  
7 *Vaughn* index is proper and appropriate under Ninth Circuit law, and thus the People’s Motion for  
8 a *Vaughn* Index is moot.

9           In addition, the parties believe this case is suitable for disposition on a motion and cross-  
10 motion for summary judgment. The parties will meet and confer prior to the filing of cross-  
11 motions for summary judgment in an attempt to reduce the number of documents in the litigation  
12 and to narrow the dispositive issues. The People do not believe it would be appropriate for the  
13 Court hear any summary judgment motion EPA plans to file until the People have had the  
14 opportunity to review a *Vaughn* index that complies with Ninth Circuit precedent, and to file their  
15 own cross-motion for summary judgment. EPA believes that summary judgment is appropriate at  
16 this time and that the Court should set a briefing schedule without delay.

17           5.     Amendment of pleadings: The parties do not expect any amendments to the  
18 pleadings.

19           6.     Evidence preservation: The People do not believe they have any evidence other  
20 than correspondence attached to the Complaint, and subsequent documents provided by EPA  
21 relevant to the issues reasonably evident in this action.

22           Defendant EPA is taking, and will continue to take, all reasonable steps to preserve any  
23 evidence reasonably evident in this lawsuit. Defendant is not aware of any document destruction  
24 programs that would apply in this case.

25           7.     Disclosures: The People do not believe that initial disclosures should be required  
26 given the nature of this case (although many of the documents that would otherwise be subject to  
27 disclosure have been attached to the Complaint). EPA does not believe that initial disclosures are  
28

1 required as this is a FOIA case.

2 8. Discovery: The People do not presently intend to conduct discovery. EPA contends  
3 that discovery is not appropriate at this time as this is a FOIA case.

4 9. Class actions: This is not a class action.

5 10. Related cases: The People are not aware of any related cases or proceedings  
6 pending before another judge of this Court, or before another court or administrative body. EPA  
7 states that the withheld documents at issue in this case are also a subset of the records at issue in  
8 the FOIA case captioned, *Natural Resources Defense Counsel v. EPA*, No. 08-cv-1082 (LAK)  
9 (S.D.N.Y.).

10 11. Relief: The People seek the following relief:

11 (a) An itemized index from EPA, for *all* withheld documents and portions of  
12 documents, containing all information needed to evaluate each claimed exemption, including but  
13 not limited to identification of the segregable portions of the documents withheld, the nature of  
14 the information contained in each portion, whether factual information is contained in each  
15 portion, and the specific justification for withholding of each such portion (“*Vaughn* index”);

16 (b) An injunction against continued withholding of all records or portions of  
17 records improperly withheld, and an order directing their immediate disclosure to the People;

18 (c) An award of costs and attorneys’ fees to the People pursuant to 5 U.S.C. §  
19 552(a)(4)(E); and

20 (d) Such other and further relief as the Court shall deem just and proper.

21 EPA seeks only dismissal of this action, and the assessment of costs, as appropriate.

22 The People contend that EPA has no ability to recover costs under the applicable law.

23 12. Settlement and ADR: The parties do not believe this case is a good prospect for  
24 settlement. The parties had an ADR Phone Conference on June 4, 2008. The parties do not  
25 request assignment to any additional ADR process at this time.

26 13. Consent to Magistrate Judge for All Purposes: EPA does not consent to the  
27 assignment of this case to a United States Magistrate Judge.

1           14.    Other references: The parties do not request reference to binding arbitration, a  
2 special master, or the Judicial Panel on Multidistrict Litigation.

3           15.    Narrowing of the Issues: The parties will meet and confer prior to the filing of  
4 cross-motions for summary judgment in an attempt to agree on a briefing schedule, reduce the  
5 number of documents in the litigation, and narrow the dispositive issues.

6           16.    Expedited schedule: The People believe that this is the type of case that can and  
7 should be handled on an expedited basis with streamlined procedures. The People request that the  
8 Court rule on the pending Motion for a *Vaughn* Index, filed March 21, 2008, as soon as possible  
9 so that they may obtain the index necessary to enable them to evaluate EPA's justifications for  
10 *each* of the claimed exemptions. EPA believes that it is unnecessary to handle this case on an  
11 expedited basis as defendant EPA has provided the plaintiff with a list of each document that EPA  
12 has withheld, in full or in part, responsive to plaintiff's FOIA request and has also provided a  
13 sample Vaughn index. Additionally, as soon as the consultation with the White House entities  
14 and officials, which is currently underway, to determine the applicability of any FOIA exemptions  
15 is completed, defendant EPA will be ready to file its dispositive motion.

16           17.    Scheduling: This is an area of dispute between the parties. The People believe  
17 that, given the time that has elapsed, the Court should order EPA to produce an adequate *Vaughn*  
18 index immediately, and not set a schedule for the filing of cross-motions for summary judgment  
19 until EPA has done so. It is the People's view that the interests of judicial economy require a  
20 single hearing for the parties' cross-motions for summary judgment; and the People's ability to  
21 file a motion for summary judgment will depend on the timing of their receipt of a legally-  
22 compliant *Vaughn* index as without it they will need to move for supplementation of EPA's  
23 index prior to filing their summary judgment motion.

24           EPA requests that the Court set a schedule for the filing of cross-motions for summary  
25 judgment, allowing defendant sufficient time to supplement the sample Vaughn index, if needed,  
26 after the conclusion of the consultation with White House entities and officials, which is currently  
27 underway, to determine the applicability of any FOIA exemptions.



1           18.     Trial: The parties do not anticipate that there will be a trial in this case. However,  
 2 in the event the action is not resolved through dispositive motion(s) for summary judgment, the  
 3 People estimate that a trial will last no longer than 2 days. Such a trial would be a bench trial.  
 4 Depending on the issues, it may be possible to reduce the length of the trial by stipulation, use of  
 5 summaries or statements or other expedited means of presenting evidence. Should the Court  
 6 determine, after the filing of any dispositive motion(s), that there remain triable issues of fact, the  
 7 People propose that a further case management conference be held for the purpose of setting a  
 8 trial schedule.

9           EPA does not anticipate that there will be a trial in this case, as it is a FOIA case that EPA  
 10 contends will be decided based upon an administrative record.

11           19.     Disclosure of Non-party Interested Entities or Persons: Not applicable.

12 Respectfully submitted,

13 EDMUND G. BROWN JR.

GREGORY G. KATSAS

14 Attorney General of the State of California

Assistant Attorney General

16 \_\_\_\_\_/s/\_\_\_\_\_

\_\_\_\_\_/s/\_\_\_\_\_

17 Laura J. Zuckerman  
 18 Deputy Attorney General  
 Dated: July 25, 2008

Isaac R. Campbell  
 U.S. D.O.J. Trial Attorney  
 Dated: July 25, 2008

### 19                                   **CASE MANAGEMENT ORDER**

20           The Case Management Statement and Proposed Order is hereby adopted by the Court as  
 21 the Case Management Order for the case and the parties are ordered to comply with this Order.

22 In addition the Court orders:

24 Dated: \_\_\_\_\_

\_\_\_\_\_

25                                   SAMUEL CONTI  
 26 Senior Judge  
 United States District Court